

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE HUMAN RIGHTS DEPARTMENT

State of Minnesota by Janeen Rosas,  
Commissioner, Department of  
Human Rights

Complainant,

v.

Distinctive Dental Services, P.A.

Respondent

**FINDINGS OF FACT,  
CONCLUSIONS AND  
ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) George A. Beck on September 12-13, 2000 at the McLeod County Sheriff's Office, 810 East 10<sup>th</sup> Street, Glencoe, Minnesota. The Complainant filed post-hearing memorandum on November 6, 2000, and the Respondent faxed its memorandum on December 5, 2000. The record closed on December \_\_\_\_, 2000 when the Complainant filed her reply brief.

Richard L. Varco, Jr., Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota, 55103-2106, appeared on behalf of the Commissioner of the Minnesota Human Rights Department (Complainant). Duane G. Johnson, Attorney at Law, 4318 Xerxes Avenue North, Minneapolis, Minnesota 55412, appeared on behalf of Distinctive Dental Services, P.A. (Respondent).

**NOTICE**

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

**STATEMENT OF ISSUES**

1. Whether Distinctive Dental Services discriminated against Dr. Bryan Correll on the basis of marital status in violation of Minnesota Statute § 363.03, subd. 1(2)(b) and, if so, what damages or other relief, if any, should be assessed pursuant to Minn. Stat. § 363.071, subd. 2.
2. Whether a civil penalty is appropriate in this case.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Bryan Correll is a licensed dentist who currently practices dentistry in Spokane, Washington. Dr. Correll obtained his D.D.S. degree from the University of Minnesota in June of 1993.<sup>[1]</sup>

2. Dr. Michael Thoennes is the sole owner and operator of Distinctive Dental Services. Distinctive Dental Services has dental clinics in Winsted, Howard Lake and Columbia Heights, Minnesota. The Winsted and Howard Lake clinics are approximately six miles apart. Dr. Thoennes works primarily at his Winsted clinic.<sup>[2]</sup>

3. On February 7, 1994, Bryan Correll entered into a Dentist Employment Agreement with Distinctive Dental Services. Dr. Correll began his employment on February 9, 1994.<sup>[3]</sup>

4. Paragraph 17 of the Employment Agreement between Dr. Correll and Distinctive Dental Services provided that:

During the period of employment, Employee shall not engage in any other business activity, directly or indirectly, regardless of whether it is for profit, gain, or otherwise that is similar to the business activity of Employer within 7 miles of the office of Employer.<sup>[4]</sup>

5. Dr. Correll started practicing at the Howard Lake clinic three days a week on February 9, 1994. By late spring of 1994 the practice grew, and Dr. Correll began working four days a week.<sup>[5]</sup>

6. In April or May of 1994, Dr. Thoennes told Dr. Correll that he was not comfortable with Dr. Correll performing one-step root canals. Dr. Correll responded to Dr. Thoennes' concern by saying "okay". Dr. Thoennes interpreted Dr. Correll's response to mean that Dr. Correll would stop performing one-step root canals. Dr. Correll, however, continued to perform one-step root canals because Dr. Thoennes did not specifically forbid him from doing so.<sup>[6]</sup>

7. In May of 1994, Dr. Correll called Dr. Thoennes to complain about a "massive hole" he had in his schedule due to patient cancellations. Dr. Correll was upset and demanded that Dr. Thoennes send some of his scheduled patients over to the Howard Lake office for Correll to see. Dr. Correll told Dr. Thoennes that he owed him the patients and that Thoennes was "full of hot air".<sup>[7]</sup>

8. In June 1994, Bryan Correll's wife, Mary Beth Correll, graduated from the University of Minnesota's dental school.<sup>[8]</sup>

9. Dr. Correll had conversations with his assistants at the Howard Lake clinic about his desire to own his own dental practice. Dr. Correll also spoke of an opportunity he had to purchase an established dental practice from a friend of his father. The practice was located in Spokane, Washington and Dr. Correll explained that his wife did not want to move away from her family in Minnesota.<sup>[9]</sup>

10. On the afternoon of June 16, 1994, Dr. Correll closed the Howard Lake office without Dr. Thoennes' permission. Dr. Correll had no appointments scheduled in the afternoon and his parents were in town visiting for his wife's graduation.<sup>[10]</sup>

11. In August of 1994, Dr. Thoennes expressed concern to an associate dentist at his Colombia Heights office that Dr. Correll was billing for composites when he was only applying sealants. Sealants are an unfilled resin-type material that are placed in the grooves of the posterior teeth to prevent decay. Composites are a filled resin restoration material with porcelain particles. Sealants are less durable and less expensive than composites.<sup>[11]</sup>

12. On or about September 2, 1994, Dr. Thoennes learned that Bryan Correll's wife had accepted a dentist position with Dr. James Neff's office in Winsted. Dr. Neff and Distinctive Dental Services are the only dental care providers in the city of Winsted.<sup>[12]</sup> Dr. Thoennes was angry when he learned of this and was concerned about the confidentiality of his records and trade secrets.

13. Dentistry is a competitive business, particularly in a small town where there is a limited patient base.<sup>[13]</sup>

14. On September 7, 1994, Dr. Thoennes faxed to Dr. Correll questions regarding his treatment of a patient who had sustained extensive damage to his teeth due to an automobile accident. Dr. Thoennes was concerned that some of the work should not have been billed to the patient's automobile insurance because the damage appeared to be due to neglect and decay rather than to the trauma of the accident.<sup>[14]</sup>

15. On September 9, 1994, Mary Beth Correll began working at Dr. James Neff's clinic.<sup>[15]</sup>

16. On September 9, 1994, Dr. Michael Thoennes called Bryan Correll and asked to meet with him at the end of the day. During their late afternoon meeting, Dr. Thoennes asked Dr. Correll questions regarding his treatment of the patient injured in the automobile accident. Specifically, Dr. Thoennes wanted Dr. Correll to explain why he had performed root canals and placed crowns on certain teeth. After discussing the patient's care, Dr. Thoennes requested that Dr. Correll write in the patient's chart that he believed all of the treatment performed was necessary due to the damage caused by the automobile accident.<sup>[16]</sup>

17. After Dr. Correll had written in the patient's chart, Dr. Thoennes asked Dr. Correll to explain his wife's recent employment with Dr. James Neff in Winsted. Dr. Thoennes showed Dr. Correll the local newspaper article and photo announcing his wife's employment with Dr. James Neff. Dr. Correll confirmed that his wife had taken a position at Dr. Neff's clinic. Dr. Correll further stated that his wife's employment was none of Dr. Thoennes business and that Dr. Thoennes had no right dictating where his wife could work. Dr. Thoennes responded that he thought Dr. Correll had been deceitful by not telling him about his wife's job.

Dr. Thoennes then handed Dr. Correll a letter notifying him that he was terminating his employment. The letter stated that Dr. Correll had committed a "defacto breach of contract" due to his wife contracting with Dr. James Neff to perform dental services within the City of Winsted. The letter specifically referenced paragraph 17 of the contract.<sup>[17]</sup>

18. After presenting Dr. Correll with the termination letter, Dr. Thoennes informed Dr. Correll that if his wife quit her job with Dr. Neff, Dr. Thoennes would not fire

Dr. Correll. Dr. Thoennes gave Dr. Correll until 9:00 p.m. on Sunday, September 11, 1994, to let him know whether his wife would continue working for Dr. Neff.<sup>[18]</sup>

19. On the evening of September 11, 1994, Bryan Correll called Dr. Thoennes and told him that his wife was not going to quit her job with Dr. Neff. As a result, Dr. Thoennes terminated Dr. Correll.<sup>[19]</sup>

20. At the time of his termination Dr. Correll and his wife and baby resided in Waconia, Minnesota in a home they purchased in March of 1994. The Correll's had approximately \$100,000 in educational loans. Dr. Correll's in-laws live in Minnetonka, Minnesota.

21. After being fired from his position at Distinctive Dental Services, Bryan Correll looked for other dentist positions. He received job listings from the University of Minnesota's dental school placement office, contacted dental practice brokers, joined dentist study clubs, and made cold calls from listings in the Yellow Pages.<sup>[20]</sup> Despite these efforts and several interviews, Bryan Correll was unable to secure a position as a dentist until February 7, 1995 when he took a job working three days a week with a Dr. John Mower. Dr. Correll was paid \$45 an hour or 33% of production, less 1/3 the cost of lab work with Dr. Maeurer.<sup>[21]</sup>

22. There were employment opportunities in Minnesota for recent dental school graduates in 1994-1995.<sup>[22]</sup>

23. Dr. Correll averaged \$1,840 net pay every 2 weeks while working for Distinctive Dental Services. Dr. Correll lost \$18,400 in wages as a result of being unemployed from September 9, 1994 to February 7, 1995.<sup>[23]</sup>

24. In March or April of 1995, Bryan Correll flew out to Spokane, Washington and met with Dr. Ed Torgerson regarding the purchase of Dr. Torgerson's dental practice. Dr. Torgerson is a long-time friend of Dr. Correll's father and he offered Dr. Correll very reasonable terms for purchasing his practice. During his visit, Dr. Correll agreed to work for and eventually purchase Dr. Torgerson's dental clinic in Spokane, Washington.<sup>[24]</sup>

25. Dr. Correll's wife, Dr. Mary Beth Correll, did not want to move to Spokane because she did not want to be separated from her family.<sup>[25]</sup>

26. Bryan Correll and his wife moved to Spokane, Washington in August 1995. Bryan Correll began working at Dr. Torgerson's practice five days a week for 33% of production less 1/3 lab costs.<sup>[26]</sup>

27. As a result of being terminated, Dr. Correll suffered anxiety, and feelings of inadequacy, frustration and anger. In addition, the stress from being unemployed and the decision to move to Spokane caused strain in the Correll's marriage.<sup>[27]</sup>

28. On September 7, 1995, Bryan Correll filed a charge of marital status discrimination with the Minnesota Department of Human Rights.

29. After the Department of Human Rights made a probable cause determination favorable to Dr. Correll, Distinctive Dental Services sent Dr. Correll a demand for arbitration pursuant to paragraph 12 of the Employment Agreement. Dr. Correll filed a petition for a stay of arbitration in district court arguing that the Human

Rights Act precludes arbitration of this dispute. On March 16, 2000, the Minnesota Supreme Court ruled in Dr. Correll's favor and ordered that the arbitration be stayed pending the resolution of Dr. Correll's Human Rights Act claim. Dr. Correll incurred \$32,463.60 in attorney fees in challenging Distinctive Dental Services' arbitration demand.<sup>[28]</sup>

30. On March 5, 1998, counsel for Dr. Thoennes was served with the Complaint, Notice of and Order for Hearing and Notice of Appearance in this matter.

31. The Complaint alleged that Distinctive Dental Services terminated Dr. Correll's employment on the basis of marital status discrimination in violation of Minn. Stat. § 363.03, subd. 1(2)(b) (1996).

32. Following the March 16, 2000 decision of the Minnesota Supreme Court, this matter was scheduled for hearing.

### **CONCLUSIONS**

1. The Administrative Law Judge and the Minnesota Department of Human Rights have jurisdiction in this matter pursuant to Minnesota Statutes §§ 14.50 and 363.071.

2. The Department has complied with all relevant substantive and procedural requirements of law and rule including providing proper notice of the hearing in this matter.

3. Under Minn. Stat. § 363.03, subd. 1(2)(b) it is an unfair discriminatory practice for an employer to discharge an employee because of marital status.

4. The Respondent is an employer within the meaning of Minn. Stat. § 363.01 subd. 17.

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that Distinctive Dental Services discriminated against Dr. Bryan Correll on the basis of marital status in violation of Minn. Stat. § 363.03, subd. 1(2)(b).

6. The Complainant has presented direct evidence that Distinctive Dental Services discriminated against Dr. Bryan Correll based on marital status.<sup>[29]</sup>

7. The Complainant has established a prima facie case of marital status discrimination by a preponderance of the evidence.

The Respondent has advanced a legitimate nondiscriminatory reasons for its termination of the Charging Party.

The Complainant has demonstrated that the asserted reasons were pretextual.

8. The Complainant has established by a preponderance of the evidence that Distinctive Dental Services discriminated against Dr. Bryan Correll on the basis of marital status in violation of Minn. Stat. § 363.03, subd. 1(2)(b).

9. The Respondent has not proved that its terminating of the Charging party was based on a bona fide occupational qualification.

10. Minn. Stat. § 363.071, subd. 2, permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Dr. Bryan Correll is entitled to compensatory damages in the amount of \$\_\_\_\_\_, which reflects Dr. Correll's six months of lost wages from DDS less the wages he earned from Dr. Mower from February 7, 1995 to March 10, 1995.

11. Under Minn. Stat. § 363.071, subd. 2 and the standards set forth in Minn. Stat. § 549.20, punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. Punitive damages will be considered after submission of the financial dates.

12. Minn. Stat. § 363.071, subd. 2, requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. The statute requires consideration of the seriousness and the extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional. A civil penalty will be determined upon submission of the Respondent's tax returns.

13. Minn. Stat. § 363.071, subd. 7, requires the award of litigation and hearing costs of the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. Litigation and hearing costs will be considered upon submission of the Respondent's tax returns and of the costs incurred by the Department of Human Rights.

14. Within 10 days of the date of this order the Respondent, Distinctive Dental Services, shall submit its federal tax returns, and accompanying forms and schedules, for the years 1997, 1998 and 1999 to the Administrative Law Judge. The submission will be a sealed exhibit in the hearing record.

15. That within 10 days the Complainant shall submit an affidavit setting out in detail the Department's litigation and hearing costs.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

### **ORDER**

IT IS HEREBY ORDERED THAT

Dated this \_\_\_\_ day of December, 2000.

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GEORGE A. BECK  
Administrative Law Judge

Reported: Transcribed (2 volumes).

## NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

## MEMORANDUM

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- <sup>[1]</sup> T. 8.
  - <sup>[2]</sup> T. 240-244.
  - <sup>[3]</sup> T. 11-12; Cp. Ex. 1.
  - <sup>[4]</sup> Cp. Ex. 1.
  - <sup>[5]</sup> T. 13.
  - <sup>[6]</sup> T. 249-51; T. 391-392.
  - <sup>[7]</sup> T. 256-257; T. 393-394.
  - <sup>[8]</sup> T. 9.
  - <sup>[9]</sup> T. 103, 154-156.
  - <sup>[10]</sup> T. 252-256; T. 389-391; Rp. Ex. 2.
  - <sup>[11]</sup> T. 187-204; T. 216-217; T. 260-262.
  - <sup>[12]</sup> T. 219; T. 270-271.
  - <sup>[13]</sup> T. 165; T. 217-218; T. 351-352, pp. Ex. 8.
  - <sup>[14]</sup> T. 265-270; Rp. Ex. 3.
  - <sup>[15]</sup> T. 110.
  - <sup>[16]</sup> T. 19-20; T. 278-283; Rp. Ex. 3, 4.
  - <sup>[17]</sup> T. 19-22; T. 283-286; Cp. Ex. 5.
  - <sup>[18]</sup> T. 20-23; T. 284-287.
  - <sup>[19]</sup> T. 34; T. 287.
  - <sup>[20]</sup> Cp. Ex. 6.
  - <sup>[21]</sup> T. 39-61.
  - <sup>[22]</sup> T. 358-359, Rp. Ex. 8.
  - <sup>[23]</sup> Cp. Ex. 3.
  - <sup>[24]</sup> T. 42-43, 67-69, 103.
  - <sup>[25]</sup> T. 120-123.
  - <sup>[26]</sup> T. 61-62.
  - <sup>[27]</sup> T. 66, 69-72.
  - <sup>[28]</sup> Cp. Exs. 12, 13.
  - <sup>[29]</sup> Complainant's Exhibit 5 *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 n.4 (Minn. 1992).